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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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WESTPORT INSURANCE CORPORATION,

Plaintiff,

v. 07-CV-6726 (SHS)

PATRICIA HENNESSEY, ESQ., and COHEN, HENNESSEY, BIENSTOCK & RABIN, P.C., f/k/a COHEN, HENNESSEY, BIENSTOCK, P.C.,

Defendants. Decision

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New York, N.Y.
September 2, 2008
2:44 p.m.

Before:

HON. SIDNEY H. STEIN,

District Judge

APPEARANCES

LEWIS BRISBOIS BISGAARD & SMITH LLP
Attorneys for Plaintiff
BY: MARK K. ANESH, ESQ.

FRIED & EPSTEIN LLP
Attorneys for Defendants
BY: JOHN W. FRIED, ESQ.

ALSO PRESENT: PAUL C. KURLAND, ESQ., Snow Becker Krauss
STACEY GRAHAM, Westport Insurance Corporation
HARRIET NEWMAN COHEN, Cohen Hennessey Bienstock

(In open court)

(Case called)

THE CLERK: Counsel, please state your names for the record.

MR. ANESH: Mark Anesh, Lewis Brisbois Bisgaard & Smith, for plaintiff Westport Insurance Company.

MR. FRIED: John W. Fried, Fried & Epstein LLP, for defendant Patricia Hennessey and Cohen Hennessey Bienstock & Rabin, P.C.

THE COURT: And we also have present from Westport Insurance Company Stacey Graham; and from Cohen Hennessey, we have Ms. Cohen.

Sir, did you make your appearance as well?

MR. KURLAND: Yes. While I'm not appearing in this action, I'm counsel to the defendants here in the underlying malpractice case pending in Westchester County Supreme Court. My name is Paul C. Kurland, K-U-R-L-A-N-D, of Snow Becker Krauss, P.C.

THE COURT: All right. Good afternoon. Welcome to all of you. I appreciate the substantial efforts the parties have taken in an attempt to resolve this. Those efforts were unsuccessful. And as indicated, I will proceed to reading a decision on the pending motions. My decision is as follows:

Plaintiff Westport Insurance Corporation brings this action for a declaratory judgment that it need not defend nor

indemnify defendants Patricia Hennessey or her firm, Cohen, Hennessey, Bienstock & Rabin, in a malpractice action filed by Jayne Asher against Hennessey and the Cohen Hennessey firm resulting from their legal representation of Ms. Asher in her divorce. Westport contends that defendants "knew or could have reasonably foreseen" that their acts "might be expected to be the basis" for a malpractice claim against them by Ms. Asher prior to the March 14, 2006 effective date of their malpractice insurance policy with Westport, and thus Westport need not indemnify nor defend defendants in that action. In response, Hennessey and the law firm seek partial summary judgment in this action on three of their four counterclaims: (Counterclaim #1) a declaratory judgment that Westport must defend defendants in Ms. Asher's malpractice suit; (Counterclaim #2) a claim alleging that Westport has breached its insurance contract with the defendants by refusing to defend them in the malpractice action; and (Counterclaim #4) an award of attorney's fees in this action.

The Court finds that Hennessey and the law firm could not have reasonably foreseen that Ms. Asher's failure to make certain elections concerning her ex-husband's life insurance policies set forth in the agreement resolving the divorce would give rise to a malpractice claim against them. Accordingly, Westport's summary judgment motion is denied, and defendants' motion for partial summary judgment is granted. The Court

heard extensive oral argument on the motions on June 18th of this year.

The facts are as follows:

Defendants Hennessey and the Cohen Hennessey firm purchased a Lawyers Professional Liability Policy for professional malpractice claims issued by Westport that was to cover defendants for claims made between March 14, 2006 and March 13, 2007. (Plaintiff's 56.1 Statement, ¶¶1 and 2; Defendant's Counterstatement Pursuant to Rule 56.1(a), ¶¶1 and 2.) Exclusion B in the 2006 Policy states as follows:

This policy does not apply to...

B. any CLAIM arising out of any act, error, [or] omission... occurring prior to the effective date of this policy if any INSURED at the effective date knew or could have reasonably foreseen that such act, error, [or] omission... might be expected to be the basis of a CLAIM or suit.

(Lawyers Professional Liability Insurance Policy, which is Exhibit A to Plaintiff's 56.1 Statement at 4.)

In 2000, Jayne Asher retained Cohen Hennessey to represent her in her divorce from Sanford Asher. Ms. Hennessey was the lawyer primarily responsible for representing Ms. Asher. (Defendants' 56.1, ¶¶1 and 2; Hennessey Affidavit dated November 20, 2007, ¶7.) On or about October 15, 2002, Jayne Asher and Sanford Asher executed a Stipulation of Settlement in their divorce action, which states in part that:

"Wife may, at her option assume, at her expense, the existing term life insurance policy on Husband's life... which has a death benefit of One Million Dollars ($1,000,000). Wife shall elect, by February 1, 2003, whether she wishes to assume the policy, in which event, Wife shall have sixty (60) additional days, if necessary, to effectuate the transfer of ownership of said policy to herself.

"Wife is the owner of a variable ordinary life policy on the life of Husband... which has a death benefit of One Million Dollars ($1,000,000)... Wife shall transfer the ownership of said policy to Husband unless, by February 1, 2003, Wife notifies Husband that she elects to retain ownership of said policy."

(Defendants' 56.1(b) ¶¶10-16; Hennessey Affidavit ¶¶11-13, Exhibit 1 to the Hennessey Affidavit at Article IX, ¶¶1 and 2.) On January 28, 2003, Mr. Asher's attorney wrote to Ms. Hennessey that "[w]e are waiting for [Ms. Asher] to make her election regarding the life insurance policies." (Plaintiff's and Defendants' 56.1, ¶13; and Letter to Patricia Hennessey dated January 28, 2003, Exhibit G to Plaintiff's 56.1.) Ms. Asher did not elect to retain or assume ownership over either policy by February 1, 2003, which is the date specified in the Stipulation. The citation there is *J.A. v. S.A.*, 4 A.D. 3d 248,251 (1st Dep't 2004). Three and one half months later, on May 22nd, 2003, a justice of the Supreme

Court of the State of New York gave Ms. Asher additional time to make her election. (Exhibit 3 to the Hennessey Affidavit.) On February 24, 2004, the Appellate Division, First Department reversed that determination, however, finding that "the stipulation [was] clear and unambiguous in affording the wife until February 1, 2003 to exercise her life insurance options. Clearly, she failed to act within the deadline and thus waived her right of election." *J.A. v. S.A.*, 4 A.D.3d at 251.

On or about July 26, 2006, Cohen Hennessey sent Westport a June 29, 2006 letter Hennessey had received from Ms. Asher's attorney, stating that Ms. Asher was damaged by Cohen Hennessey's failure to timely exercise Ms. Asher's right of election as to the insurance policies. (The parties' 56.1 Statements, ¶4; Exhibit B to Plaintiff's 56.1, Letter from Paul I. Marx, Esq.) Seven months later, on January 23, 2007, Ms. Asher filed a legal malpractice action against defendants in New York State Supreme Court, alleging that "by reason of defendants' failure to timely exercise the rights of election, Plaintiff was barred from doing so and lost the benefit of the life insurance policies." (56.1 Statements ¶6; and Exhibit D to Plaintiff's 56.1 statement at ¶¶17 and 18.)

On March 22, 2007, Westport sent defendants a reservation of rights letter, stating that it was reserving its right to investigate and possibly deny coverage as to Ms. Asher's claims. (56.1 Statement ¶12.) On July 11, 2007,

Westport sent a letter to the defendants stating that it was in fact denying coverage pursuant to Exclusion B of the Policy, because

"there is objective evidence that [defendants] were aware of an act, error or omission which [they] knew or could reasonably foresee might be expected to be the basis of a claim or suit against [them] when the February 24, 2004 Appellate Division Order found that Ms. Asher lost any rights to the policies due to the failure to comply with the Stipulation. This was known prior to the Westport policy effective date of March 14, 2006."

(56.1 Statements ¶15; Exhibit H to Plaintiff's 56.1 Statement.)

On July 26, 2007, Westport filed this action, seeking a declaratory judgment absolving it of responsibility to defend or indemnify defendants with respect to the Asher malpractice action. Defendants in turn asserted four counterclaims: (1) Counterclaim #1: seeking a declaratory judgment that Westport is required to defend defendants in the Asher malpractice action; Counterclaim #2: claims that Westport has breached its contract with defendants by disclaiming its duty to defend; Counterclaim #3: claims that Westport has breached its contract with defendants by disclaiming its duty to indemnify; and Counterclaim #4: seeks attorney's fees and expenses in this action.

Westport has now moved for summary judgment for declaratory judgment, arguing that Exclusion B of its coverage policy applies as a matter of law, and that defendants knew or could have reasonably foreseen that Ms. Asher would file a claim against them at least as of February 24, 2004, when the Appellate Division ruled that Ms. Asher could no longer elect ownership of the life insurance policies. In response, Hennessey and the Cohen Hennessey law firm argue that they did not know and could not have known that Ms. Asher would file a suit against them, and they ask this Court to grant a partial summary judgment on three of their four counterclaims. Specifically, on Counterclaim #1, they wanted declaratory judgment that Westport must pay to defend Hennessey and the Cohen Hennessey law firm in Ms. Asher's malpractice suit; Counterclaim #2 seeks a finding that Westport breached its contract with defendants by refusing to defend them in the malpractice action; and Counterclaim #4 seeks an order of attorney's fees, as I've said. As to the third counterclaim, which was breach of contract for Westport's refusal to indemnify, defendants assert that Westport's claim for a declaratory judgment that it need not indemnify defendants is premature, and ask that Westport's action be dismissed without prejudice or stayed insofar as it seeks a declaratory judgment that there is no duty to indemnify until the underlying Asher malpractice suit has been adjudicated.

Let's now turn to the standards on summary judgment. You all know what they are.

It's appropriate to grant summary judgment only if the evidence shows that there's no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317,322 (1986); *Allen v. Coughlin*, 64 F.3d 77,79 (2d Cir. 1995). In determining whether a genuine issue of material fact exists, the Court "is to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Patterson v. County of Oneida*, 375 F.3d 206,219 (2d Cir. 2004); see also *LaFond*, 50 F.3d at 171. However, the party opposing summary judgment "may not rely on mere conclusory allegations or speculation, but instead must offer some hard evidence" in support of its factual assertions such that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Those are quotations from *D'Amico v. City of New York*, 132 F.3d 145,149 (2d Cir. 1998), and *Golden Pacific Bancorp v. FDIC*, 375 F.3d 196,200 (2d Cir. 2004).

Now here, both parties have moved, cross-moved for summary judgment and the same legal standards apply. "[E]ach party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." That's *Morales v.*

Quintel Entertainment, Inc., 249 F.3d 115,121 (2d Cir. 2001).

Now I want to turn to the duty to defend.

Under New York law, which is the applicable law here, an insurer has an "exceedingly broad" duty to defend the insured. *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131,137 (2006) (quoting *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640,648 (1993), and "'[i]f, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be.'" *Id.* (quoting *Ruder & Finn, Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663,670 (1981)). Once a duty to defend is triggered, the insurer must continue to defend the insured unless and until the insurer "can 'demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and further, that the allegations, in toto, are subject to no other interpretation.'" *Id.* (quoting *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153,159 (1992)).

The allegations in the Asher complaint -- that defendants were negligent by giving Ms. Asher "incorrect and fallacious advice regarding rights of election under the Stipulation" (Asher Complaint ¶19) -- suggest that the claim is "within the embrace of the policy" for professional liability insurance. See *Ruder & Finn*, 52 N.Y.2D at 670-74. Westport relies on Exclusion B to seek the declaratory judgment that it

need not defend or indemnify defendants.

So let's now look at the exclusion.

To avoid coverage on the basis of an exclusion, the burden is on the insurer to demonstrate the applicability of that exclusion. *Cook*, 7 N.Y.3d at 137; see also *Village of Sylvan Beach, N.Y. v. Travelers Indem. Co.*, 55 F.3d 114,115-16 (2d Cir. 1995). The insurer must also prove that the exclusion is unambiguous. See *Sea Ins. Co., Ltd. v. Westchester Fire Ins. Co.*, 51 F.3d 22,26 (2d Cir. 1995).

With respect to the particular exclusion at issue here, the New York Court of Appeals has not yet definitively determined whether an objective standard -- "e.g., could a reasonable lawyer foresee that his act or error might form the basis of a claim" -- or a subjective standard -- "e.g., did the insured lawyer actually believe that his act or error might give rise to a claim" -- applies. *Westport Ins. Co. v. Goldberger & Dubin, P.C.*, 2006 U.S. Dist. LEXIS 31329, at *8-9 (S.D.N.Y. Mar. 3, 2006) (determining that New York courts would apply an objective standard) aff'd, summary order at 255 Fed. App'x 593 (2d Cir. Nov. 29, 2007). When a lawyer does not inform his insurance company about an incident that leads to a claim, under a subjective standard, the Court must determine whether the insured lawyer thought his client would file a claim; under an objective standard, the Court must determine whether "a reasonable lawyer would know or could reasonably

foresee that [his mistake] might give rise to a malpractice claim." *Id.* at *15-16.

Both sides in this action have spent significant portions of their briefing arguing whether the language of Exclusion B is ambiguous and whether the standard the Court should apply is objective or whether it is subjective. Plaintiff contends that Exclusion B is unambiguous and that the objective standard should apply. It contends that because defendants here had knowledge of their allegedly wrongful acts and could reasonably have foreseen a claim which would be made against them prior to the effective date of the policy, plaintiff need not defend or indemnify defendants in the underlying malpractice suit. Defendants contend that Exclusion B should be interpreted under a subjective standard, and because there was no evidence that defendants thought Ms. Asher was planning to sue them, then the exclusion does not apply. Defendants argue alternatively that even if an objective standard applies, Westport's cases are inapposite because they involve lawyers who clearly failed to carry out their responsibilities as attorneys, such as failing to file suits before the statute of limitations expired or failing to prosecute cases.

Even under a purely objective standard, plaintiffs have failed to demonstrate to the Court that the defendants knew or should have known that a claim would arise from

Ms. Asher's failure to make her election before February 1, 2003. No proof has been adduced that defendants were responsible for electing Ms. Asher's benefits for her or for advising her as to whether or not to make the election. No provision of the Stipulation either permitted or obligated the law firm itself or the attorney on the case, Ms. Hennessey, to exercise Ms. Asher's election to assume the term life policy or retain the variable life policy. (Defendants' 56.1 Statement at ¶¶18-21; and the Hennessey Affidavit ¶13; Exhibit 1 in the Hennessey Affidavit.) The Appellate Division's decision of February 24, 2004 did not involve defendants as part of the opinion and did not even mention or refer to Hennessey or Cohen Hennessey in any way. It stated that "the stipulation is clear and unambiguous in affording the wife until February 1, 2003 to exercise her life insurance options." See *J.A. v. S.A.*, 4 A.D.3d at 251. Plaintiff points to the January 28, 2003 letter from Mr. Asher's attorney to Ms. Hennessey, but that letter states that he and his client "were waiting for Jayne [Asher] to make her election regarding the life insurance policies," and even notes that a copy of the letter had been sent directly to Ms. Asher. (Exhibit H, Plaintiff's 56.1.)

Plaintiff argued that first, "a lawyer [needs to] advise his or her client about a pending deadline and the consequences of failing to meet it," and, second, even if the deadline was not part of defendants' original duties, it was

part of their "peripheral duties" in representing Ms. Asher. As to either point, the caselaw plaintiff cites is wholly inapposite to this case.

In contending that lawyers must advise clients of a deadline, which is true, plaintiff cites cases involving lawyers who failed to file a case before the applicable statute of limitations ran out, see, for example, *Goldberger & Dubin*, 2006 U.S. Dist. LEXIS 31329; *Ingalsbe v. Chicago Ins. Co.*, 270 A.D.2d 684,704 (3d Dep't 2000); *Bellefonte Ins. Co. v. Albert*, 99 A.D.2d, 947,472 (1st Dep't 1984); or failed to prosecute a case, see *Mt. Airy Ins. Co. v. Thomas*, 954 F.Supp. 1073 (W.D. Pa. 1997); or failed to take other necessary action, all resulting in a case being dismissed, see, e.g., *Sirignano v. Chicago Ins. Co.*, 192 F.Supp.2d 199 (S.D.N.Y. 2002) (failure to provide opponent with expert report led to case being taken off trial calendar, and, after a 15-month standstill, the case was dismissed as abandoned); *Fogelson v. Home Ins. Co.*, 129 A.D.2d 508,514 (1st Dep't 1987) (attorney's failure to file an answer led to a default judgment against the client.) In those cases, an attorney was retained to undertake some task and failed to do so within the requisite time frame, to the client's detriment. In contrast, here, based on the evidence to date, the law firm was not hired to advise Ms. Asher whether to elect to assume the life insurance policies; it was hired to represent her in her divorce action. There is no evidence that

defendants knew they were responsible for electing Ms. Asher's coverage on her behalf or even advising her as to whether it was in her financial interests to make the election one way or the other -- in fact, all the evidence in this record is to the contrary. Therefore, when Ms. Asher did not elect to purchase Mr. Asher's life insurance policy by the contractual deadline, there is nothing in the record to make defendants aware that they had committed an allegedly negligent act, and therefore they could not have reasonably foreseen that any negligent act would have been the basis of a claim.

Similarly, in arguing that lawyers have undefined duties to their clients that are peripheral to those which fall within the duties for which lawyers were retained, the only cases plaintiff cites involve lawyers who were hired to commence workers' compensation proceedings and failed to advise their clients to also file a personal injury action before the statute of limitations ran out. See *Greenwich v. Markoff*, 234 A.D.2d, 112 (1st Dep't 1996); *Davis v. Klein*, 224 A.D.2d 196 (1st Dep't 1996); *Campbell v. Fine*, 642 N.Y.S.2d 819 (N.Y. Sup. Ct. New York County 1996). Plaintiffs also point to a treatise on legal malpractice which discusses this peripheral duty as a lawyer's obligation to a client regarding legal needs collateral to the original scope of the representation for which a lawyer is obligated to advise his client. See Mallen & Smith, 1 Legal Malpractice § 8:2 (2008 ed.). The treatise

states that "[t]he controlling standard is whether the remedy or liability should have been apparent to the ordinary lawyer under the circumstances. The rationale is that, as between the client and the lawyer, the latter is much more qualified to recognize and analyze the client's legal needs." *Id.* The cases and the treatise are not on point on this, as they relate specifically to legal duties, such as the duty to advise a client as to the applicable statute of limitations for a separate but related claim, which is, as I said, inapposite here, where the duties to elect the benefits was vested in the client, and even under an objective standard, as noted earlier, there is no evidence that defendants knew or could reasonably have known that they were responsible for electing Ms. Asher's coverage on her behalf or advising her as to whether she should elect those benefits.

There is no evidence in this record that defendants should have made an election regarding life insurance on her behalf or even advised her in that regard, and plaintiff has pointed to no source of such a duty apart from the readily distinguishable cases I've just discussed. As a matter of law, a reasonable lawyer in defendants' position would not have known or reasonably foreseen that Ms. Asher's own failure to elect her life insurance benefits might give rise to a malpractice claim, even after the Appellate Division's decision. See *Goldberger*, 2006 U.S. Dist. LEXIS 31329, at

*15-16. This is true even under an objective interpretation of Exclusion B. There are no genuine issues of material fact with regard to the duty to defend on the record, and summary judgment on the duty to defend is denied as to plaintiff and granted as to defendants on their first and second counterclaims.

Even if Exclusion B applied, Westport would be required to defend Hennessey and Cohen Hennessey against Ms. Asher's claims that did not relate specifically to the failure to elect the life insurance benefits. See *New York Central Mut. Fire Ins. Co. v. Heidelmark*, 108 A.D.2d 1093,1095 (3d Dep't 1985) ("That the complaint 'asserts additional claims which fall outside the policy's general coverage or within its exclusionary provisions' does not free the carrier of this obligation" to defend) (quoting *Seaboard Sur Co. v. Gillette Co.*, 64 N.Y.2d 304,486 (1984)); see also *Ruder & Finn*, 52 N.Y.2d at 669. (The duty to defend "includes the defense of those actions in which alternative grounds are asserted, even if some are without the [insurance] protection purchased.") Ms. Asher's complaint claims, for example, that defendants "fail[ed] to provide good, proper, honest and competent legal advice," "breach[ed] the contractual retainer agreement between the parties," and "incorrectly advis[ed] [her] as to the meaning and import of the terms of the Stipulation and in other ways, not yet known, act[ed] negligently." (Complaint ¶19,

Exhibit D to Plaintiff's 56.1 Statement.) Although most of the Asher complaint does indeed focus on defendants' failure to elect the life insurance benefits, her broad allegations would not be subject to Exclusion B, as they do not necessarily arise out of the failure to elect life insurance benefits. The allegations at least "suggest... a reasonable possibility of coverage," and thus Westport has a duty to defend Hennessey and Cohen Hennessey against those allegations in the underlying action. *Cook*, 7 N.Y.3d at 137 (quoting *Rapid-American Corp.*, 80 N.Y.2d at 648).

I wish to turn now to the duty to indemnify, which is narrower than the duty to defend. See *Ruder & Finn*, 52 N.Y.2d at 669. However, the New York courts have long held that:

"[a]n action to declare the insurer's duty to indemnify is premature and does not lie where the complaint in the underlying action alleges several grounds of liability, some of which invoke the coverage of the policy, and where the issues of indemnification and coverage hinge on facts which will necessarily be decided in that underlying action."

Hout v. Coffman, 126 A.D.2d 973 (4th Dep't 1987); see also *Spoor-Lasher Co. v. Aetna Cas. & Sur. Co.*, 39 N.Y.2d 875,876-77 (1976). In the interests of economy and judicial efficiency, a court has the ability to dismiss or stay an insurance company's declaratory judgment action on the issue of indemnity while the underlying action is decided. See *Village*

of Sylvan Beach, 55 F.3d at 115-16; *United States Underwriters Ins. Co. v. Kum Gang, Inc.*, 443 F.Supp.2d 348,354-55 (E.D.N.Y. 1996). In *Kum Gang*, the court heard the portion of the suit relating to the insurers' duty to defend, but declined to exercise jurisdiction over whether the insurers were required to indemnify the policyholder, because that issue was "theoretical... [and] might be made moot by a finding of nonliability in the state court action." *Id.* 354-55.

Plaintiff's request for a declaratory judgment that it has no duty to indemnify is denied without prejudice because there has been no determination of liability in the underlying malpractice action.

The last area on this motion is the request for attorney's fees.

Under New York law, a liability insurer's obligation to defend its policyholder includes a defense against the insurer's own declaratory judgment action. *United States Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592,598 (2004); see also *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12,21 (1979); *Am. Home Assurance Co. v. Weissman*, 79 A.D.2d 923,924-25 (1st Dep't 1981). "An insured who is 'cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations,' and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action." *City Club Hotel*

(quoting *Mighty Midgets*, 47 N.Y.2d at 21).

Westport argues that it has no duty to either defend or indemnify, and it thus should not have a duty to pay defendants' costs in this suit. The Court has already determined that Westport has a duty to defend Hennessey and the Cohen Hennessey law firm in the underlying suit, and thus defendants have prevailed on the merits to that extent. Furthermore, a policyholder is entitled to the cost of defending against an insurer's declaratory judgment action that has put the policyholder on the defensive, even if the insurer did not provide the policyholder with a defense in the underlying action. *City Club Hotel*, 3 N.Y.3d at 598; see also *Mighty Midgets*, 47 N.Y.2d at 21. Westport put defendants on the defensive here, and defendants are entitled to their attorney's fees and costs incurred in defending this action. Summary judgment is granted as to the defendant's fourth counterclaim.

In sum, plaintiff's motion for summary judgment seeking a declaration that it has no duty to defend the underlying malpractice action and no duty to indemnify is denied. Defendants' motion for summary judgment declaring that plaintiff has a duty to defend the underlying malpractice action is granted (Counterclaim 1); and defendants' motion for summary judgment on the second and fourth counterclaims is granted. A hearing will be scheduled on what constitutes

reasonable attorney's fees in regard to Counterclaims 2 and 4.

That's my decision. I will enter a minute order that says, for the reasons set forth on the record today, the pending motions were decided as set forth in the opinion given orally today.

I think what we have to do now is structure the remaining part of the litigation. So I'm going to ask in the first instance that the attorneys attempt to do that and to present me with a schedule of how they see this litigation, or what remains of it, proceeding. If the parties are unable to do that, they should submit to me letters on their positions and I'll bring you in and we'll structure the litigation going forward. So let me give you two weeks to do that, to have a joint proposed schedule in two weeks, or notify me that you're unable to reach an agreement and then I'll bring you in. Or you're unable to reach an agreement and present to me each side's position and I'll bring you in.

Is there anything else I can do? All right.

MR. ANESH: Yes, your Honor. Just a little clarification, if you don't mind, on prevailing on the merits in this case. I think your Honor will agree that there is a possibility that we could prevail on the merits in this declaratory judgment action once we take discovery. So if we can prevail on the merits, why is an award of attorney's fees in this action granted, if we could still prevail on the

merits?

THE COURT: Given the fact that you have the possibility, in your view, of discovery and this so-called statement that they knew about it prior to commencement of the policy date, that's your position; it depends upon future discovery, correct?

MR. ANESH: In both the state action that we received and discovery here, we can prevail on the merits.

THE COURT: All right. Defense, do you have a response? What Mr. Anesh is really saying, because this action is not over and he hopes to find that smoking gun that he talked about in the settlement discussions that say, you knew in advance of the commencement of this policy date that you were going to be sued, that the client was dissatisfied and you were going to be sued, why should he be obligated, as I think he's correct in the decision as I've read it, for all of the attorney's fees in this litigation? Is there a response?

MR. KURLAND: If I may, your Honor.

THE COURT: Yes.

MR. KURLAND: I think your Honor has made a judgment, a decision that we're entitled to a defense of the underlying action. The insurance company breached their duty by not providing a defense. We have expended all of the money in this lawsuit up to this date, in this lawsuit, Mr. Fried had expended the money based upon their failure to provide a

defense and to bring this action. If they had done what they were supposed to do in accordance with your Honor's decision --

THE COURT: No, I understand that, I understand that, but the point Mr. Anesh is raising, I think, is saying in a way, to the extent that the action continues, he hopes to I guess be able to argue otherwise in the future based on what he finds in discovery. Is that correct?

MR. ANESH: Yes, your Honor. Based upon what I find in discovery taken in the underlying case and/or the discovery I'm going to take in this case, pursuant to the schedule we have to submit, I could prevail in this case, at which time I wouldn't owe anything. So why am I being forced to pay legal fees in this case now when I could prevail?

THE COURT: I understand the point. It's based on future discovery in this case, as you say, or the underlying malpractice case.

MR. ANESH: Future outcome of this case.

THE COURT: I understand.

MR. FRIED: Your Honor, the way that Westport has structured this case, they've in a sense divided it in half. We've now completed the first portion of the case where Westport, by its motions, have sought to deprive us of our duty to defend. The Court has issued an order and a judgment that they're obligated to provide us a defense. We've spent close to $80,000 in defending that action in this court, with regard

to the duty to defend. The way I understand the Court's decision is that up until today, having obtained a judgment on the duty to defend, we're entitled to an order to recover our attorney's fees for that portion of the case. If at the end of the case -- if at the end of the case Westport should win, then of course we're not going to renew that motion with regard to the second portion of the case. But if we prevail at the end of this case, then we would make a second motion that our attorney's fees be reimbursed from today going forward. And that's what I think the caselaw says, the *Mighty Midgets* case says. When a policyholder is put in a defensive posture by an insurance company seeking to withdraw its obligation to provide a defense, the insurance company has to reimburse the policyholder's expenses.

THE COURT: Probably would have made more sense for Westport to move for summary judgment after it had a basis for discovery in this case under its belt. But go ahead.

MR. ANESH: Well, your Honor, the reason we didn't is, we thought we had -- based on the objective standard, we would save insurer defense costs. But there is no basis in law to hold us responsible for these fees because we could ultimately prevail in this case. We can win this case. And I believe we will win this case. And there's no basis in law or fact to hold us responsible for legal fees in this case. Yes, your Honor has decided we owe the defense obligation. We're going

to pay for that. We understand that. But there's no basis in law or fact to hold us responsible for fees in this case because we can ultimately prevail in this case.

THE COURT: All right. I understand that. I was dealing with the record as I had it. And what you're saying is, it can change over time in connection with discovery that you find. I'm actually correct, I believe, on the record as it exists, but you're raising the point that it can change in the future. That's your real point.

MR. FRIED: Your Honor, can I just make one point?

THE COURT: Yes.

MR. FRIED: You cited in your opinion the *Cook* case from the New York State Court of Appeals. That case makes it explicitly clear that when an insurance company wants to disclaim coverage for defense costs, it's limited by the facts contained in the complaint. They cannot use information outside of the complaint to overcome their obligation to provide a defense. Here, what Westport is doing --

THE COURT: You mean in the Asher complaint.

MR. FRIED: Correct.

THE COURT: Go ahead.

MR. FRIED: In the Asher complaint. They have to look within the four squares of the Asher complaint.

THE COURT: Right.

MR. FRIED: And they can't use information extraneous

to the complaint, discovery information, information outside of that complaint, in order to prove they have no obligation to defend. Here, what you've done is you've looked at the Asher complaint, you've looked at the policy, and you've determined, based upon those two documents, that they have an obligation to defend.

THE COURT: Well, yes, that's true, and that's exactly what I had on these cross-motions for summary judgment. He's saying but that can change is what he's saying.

MR. FRIED: Well, that could change, but that only affects their obligation to provide indemnification. But even if the Court were to find at the end of the case that they had no obligation to provide a defense, there's nothing in the policy that requires us to reimburse to Westport the monies that they paid to provide us with a defense. And as a consequence, having expended a lot of money to defend their action, to deprive Cohen Hennessey of their right to defense, we should be entitled to our attorney's fees, their attorney's fees under the *Mighty Midgets* case, because they bifurcated this case in half. They've lost the first half. Now they want to try to win the second half. Whether they win the second half or not, I guess through discovery we'll find out. But having lost the first half on the *Mighty Midgets*, we should be, as the Court has ordered, reimbursed the attorney's fees.

THE COURT: All right. Mr. Anesh, within a week

submit to me, I guess it would be in the form of a motion to reargue that part of the decision within whatever time period you have. Do it within ten days.

MR. ANESH: Can I have by next Friday, your Honor?

THE COURT: Sure. And then ten days for a response. To reargue that portion that grants summary judgment on the counterclaim requiring you to pay the costs of this action.

MR. ANESH: Yes, your Honor.

THE COURT: I want to limit it to that. And I'll take a fresh look at that.

MR. ANESH: I understand, your Honor. Thank you, your Honor.

MR. FRIED: Thank you, your Honor.

MR. KURLAND: Thank you.

THE COURT: Thank you.

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